TESTIMONY OF ABRAHAM D. SOFAER
STATE DEPARTMENT LEGAL ADVISER
BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE
ON THE WAR POWERS RESOLUTION

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I am honored to have the opportunity to present this distinguished Committee with views of the Executive branch concerning the War Powers Resolution. I am also prepared to offer some general comments on current proposals to amend the Resolution.

This Committee is intimately familiar with the provisions and the history of the Resolution. I see no need to offer an extended description of either. Some general observations do seem in order, however, to place into proper context the Resolution's key provisions.

The War Powers Resolution has been controversial from the day it was adopted over President Nixon's veto. Since 1973, Executive officials and many Members of Congress have criticized various aspects of the Resolution repeatedly. Furthermore, it is widely regarded - by its critics and its supporters alike - as ineffective. Presidents dispute its constitutionality in certain fundamental respects; and Congress has failed to enforce its most questionable provisions.

The intense debate generated by the War Powers Resolution is part of our beloved system of government. No sooner had George Washington become President when debates commenced about the relative powers of the three branches under the Constitution. President Washington's declaration of U.S. neutrality in the war between England and France, for example, spawned a debate on the relative powers of the political branches over foreign policy and war. Legal argument has been a national pastime, particularly over the crucial powers of war and foreign affairs. We must expect it to continue.

Debate about the War Powers Resolution has focused on particular requirements of the Resolution rather than on the principles that govern Executive/Congressional relations, which has tended to divert the attention of Congress from the wisdom and effectiveness of policies to the legal niceties of this subject. It has led, and will continue to lead, to unnecessary and undesirable legal faceoffs between Congress and the President, at times when the nation most needs to formulate and implement policy effectively and wisely. The issues this Committee is addressing are therefore of the greatest importance. The crucial question in any war powers situation should be how the political branches can best cooperate in the nation's interests, not which branch is right or wrong on particular legal issues.

This Administration recognizes that Congress has a critical role to play in the determination of the circumstances under which the United States should commit its forces to actual or potential hostilities. No Executive policy or activity in this area can have any hope of success in the long term unless Congress and the American people concur in it and are willing to support its execution. We also believe, however, that the War Powers Resolution has not made a positive contribution to Executive-Congressional cooperation in this area that would justify the controversy and uncertainty it has caused and seems certain to cause in the future. It incorporates a view of the relative powers of the political branches of our government, and of their proper roles, that is at odds with the Constitution's scheme and with over two hundred years of relatively consistent experience. It is, moreover, based on erroneous assumptions about the power of both Congress and the President. It underestimates the power of Congress in the sense that it is not needed to make clear that Congress has substantial power under the Constitution in matters concerning war. And the Resolution is also unnecessary in that it can grant Congress no more power in such matters than the Constitution allows.

The notion that this Resolution is necessary to curb Presidents who claim unlimited "inherent" or unilateral power to use force is incorrect. No President has been able for long to exercise exaggerated claims of power to act in the face of legislative constraints. As Madison stated in arguing for a balance among the branches: "In republican government the legislative authority necessarily predominates." Congress has powers that enable it to curb any Executive pretension, including the power to declare war; to raise and support armies; to tax and spend; to regulate foreign commerce; and to adopt measures necessary and proper to implement its powers.

President Johnson did not make war in Vietnam; the United States made war there, until Congress decided to end its support. Indeed, it is ironic that the Vietnam War was the purported basis for the War Powers Resolution when Congress was in fact a full player in that war. President Nixon regarded repeal of the Gulf of Tonkin Resolution as insufficient to prevent him from continuing the war. But this was in the context of Congress continuing to pay for - and thereby to authorize - his actions. Once Congress denied funds for certain military activities, President Nixon ultimately complied. President Ford properly regarded as a strategic catastrophe Congress' insistence that we completely abandon Indochina, and later take no action in Angola to offset Soviet and Cuban intervention. He complied, however, as did Presidents Carter and Reagan in Angola, until the Clark Amendment was repealed.

The Resolution is intended to prevent the President from acting unilaterally, beyond a limited time period, even when Congress has not ordered him to stop, and even though the President is acting for purposes traditionally regarded as appropriate. This constitutes, as former Legal Adviser Monroe Leigh put it, a procedure by which Congress attempts "to restrain the Executive without taking responsibility for the exercise of that restraint in time of crisis."

In a great many instances over the past two hundred years, Presidents have used military force without first obtaining specific and explicit legislative authorization. In our system of government, explicit legislative approval for particular uses of force has never been necessary, and the War Powers Resolution cannot and should not be permitted to make it necessary.

Congress and the American people in fact expect that the President will use the military forces placed by Congress at his disposal for long-recognized purposes, including the defense of the United States, its bases, its forces, its citizens, its property, its fundamental interests, and its allies. This is true even with respect to the most serious forms of military power - the use of nuclear weapons. In placing such weapons at the President's disposal, Congress has recognized that the President must have the authority to use them without prior approval, in order to deter effectively an enemy attack.

Conversely, however, Congress must recognize and respect the role which the President plays under the U.S. constitutional scheme. As repository of the Executive Power of the United States, Commander-in-Chief of the armed forces, and the officer in charge of the diplomatic and intelligence resources of the United States, the President is responsible for acting promptly to deal with threats to U.S. interests, including the deployment and use of U.S. forces where necessary in defense of the national security of the United States. Congress should not, as a matter of sound policy, and cannot, as a matter of constitutional law, impose statutory restrictions that impede the President's ability to carry out these responsibilities.

It is against these basic concepts that the adequacy of the key provisions of the War Powers Resolution should be judged. If the Resolution is repealed, this Administration would certainly continue to consult and involve Congress in decisions involving the introduction of U.S. forces in hostilities. And if some future Administration attempted to behave otherwise, Congress could compel it to mend its ways.

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My remaining remarks will focus on those features of the Resolution that have led Presidents to criticize it. I will also comment on proposals to amend the Resolution.

Section 2

Section 2(c) of the Resolution states the view of Congress as to circumstances under which the President may introduce U.S. Armed Forces into actual or imminent involvement in hostilities. The list of circumstances in Section 2(c) is clearly incomplete, however. As my predecessors as Legal Adviser have advised this Committee, the list fails to include several types of situations in which the United States would clearly have the right under international law to use force, and in which Presidents have used the armed forces without specific statutory authorization on many occasions.

Specifically, Section 2(c) omits, for example, the protection or rescue from attack, including terrorist attacks, of U.S. nationals in difficulty abroad; the protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

It is not clear whether Congress really intended Section 2(c) as an exclusive enumeration of the President's authority, but in any event such an enumeration is neither possible not desirable. Any attempt by Congress to define the constitutional rights of the President by statute is bound to be incomplete and to engender controversy between the branches. The solution to this problem is to delete Section 2(c) altogether, as proposed by Senators Byrd, Nunn and Warner. The only way that the character and limits of such fundamental constitutional powers can be defined and understood is through the actions of the two branches in coping with real world events over the years. No convenient shortcut exists.

Section 3

Section 3 of the Resolution requires the President to consult with Congress "in every possible instance" before introducing U.S. Armed Forces into actual or imminent hostilities. Over the years, both before and after the Resolution was adopted, the Executive branch has engaged in consultations with the Congress in a variety of circumstances involving the possible deployment of U.S. forces abroad. Consultations have taken place whether or not called for by the Resolution. Consultations are intended to keep Congress informed, to determine whether Congress approves of a particular action or policy, and in the period immediately before an action to give Congressional leaders an opportunity

to provide the President with their views. Consultations are not intended to enable Congress to review or approve the detailed plans of a military operation.

The Resolution requires consultation "in every possible instance" and thus recognizes that consultation may be impossible in particular cases. No President has challenged the merits of the statutory obligation to consult; the statute leaves to the President the discretion to decide whether consultation is possible, and if so, to determine the form and substance of the consultation according to the circumstances of each case. In some instances, such as the introduction of U.S. forces into Egypt to participate in peacekeeping operations, detailed consultations were held with many interested members of Congress well in advance of the action contemplated. In other instances, consultation was limited to a smaller number of members, and was less extensive. In the case of the Tehran rescue mission, President Carter concluded that prior consultation was not possible because of extraordinary operational security needs.

The President's flexibility respecting the number of persons consulted and the manner and timing of consultation must be preserved. Any requirement for a schedule of regular meetings (as in the Byrd-Nunn-Warner bill) that does not preserve this element of flexibility would impermissibly interfere with the exercise of the President's Article III powers. Further, the Byrd-Nunn-Warner bill could result in the President being required to engage in prior consultation with 18 members, except in "extraordinary circumstances affecting the most vital security interests of the United States." The Administration regards this as excessively burdensome and undesirable in many cases even if "vital security interests" might not be affected.

An additional constitutional problem arises from the provisions of Section 3(2) of the Byrd-Nunn-Warner bill regarding the proposed permanent consultative group. Under that proposal, the requirement that the President consult with the group is triggered by a majority vote of that group. This is inconsistent with the Supreme Court's decision in INS v. Chadha, which precludes the Congress from taking actions having legal effect on the Executive branch except by approval of both Houses and presentment to the President for signature or veto.

On the other hand, Secretary Shultz has long indicated his support for ways of encouraging ongoing consultations between the leaders of the Executive branch and Congress on national security issues generally. The procedure proposed in the Byrd-Nunn-Warner bill, however, creates an unwieldy cabinet-like institution, thereby eliminating necessary flexibility on the most sensitive and vital issues before the two branches.

Section 4

Section 4 requires that the President submit, within 48 hours after the introduction of U.S. forces, a written report to the Congress in three circumstances: where U.S. forces are introduced into actual or imminent hostilities; where U.S. forces are introduced into foreign territory, waters or airspace "while equipped for combat", with certain exceptions; and where such forces are introduced in numbers which "substantially enlarge" the combat-equipped U.S. forces already located in a foreign country.

Presidents have uniformly provided written reports to the Congress with respect to U.S. deployments abroad, as a means of keeping the Congress informed, while reserving the Executive branch's position on the applicability and constitutionality of the Resolution. Indeed, the Executive branch has provided information to the Congress in many cases where no relevant statute applies.

The Executive branch's administration of this Section has satisfied any special need for information that Congress may have in this area. Section 4 does not require the President to state the particular subsection under which reports are made, and no President has felt compelled to do so. A definitive judgment at the outset of a deployment as to whether hostilities will result is often difficult to make. Furthermore, this practice is a useful way for the Executive to avoid unnecessary constitutional confrontations over whether Section 4(a)(1) is applicable, or whether -- even if its conditions are met -- it can properly be deemed to trigger an automatic termination under Section 5.

Section 5

Section 5 of the Resolution purports to require the President to withdraw U.S. forces from a situation of actual or imminent hostilities in two circumstances: where 60 days have elapsed without specific Congressional authorization for the continuation of their use, with some specific exceptions; and where the Congress at any time enacts a concurrent resolution requiring such withdrawal.

The 60-day provision presents serious problems under our constitutional scheme, in which the President has the constitutional authority and responsibility as Commander-in-Chief and Chief Executive Officer to deploy and use U.S. forces in a variety of circumstances, such as in the exercise of our inherent right of self-defense, including the protection of American citizens, forces and vessels from attack. The provision is particularly troublesome because it would require the withdrawal of U.S. forces by reason of the mere inaction of Congress within an arbitrary 60-day period. The Resolution itself appears to recognize that the President has independent authority to use the armed forces for certain purposes; on what basis can Congress seek to terminate such independent authority by the mere passage of time?

In addition to this general, constitutional objection, this provision has several harmful effects:

- The imposition of arbitrary and inflexible deadlines interferes with the effective and successful completion of the initiative undertaken by the President.

- Such limits may signal a divided nation, giving our adversaries a basis for hoping that the President may be forced to desist, or at least feel pressured to do so. As Senator Tower recently testified: "The important thing is that we be perceived as being able to act with dispatch, and that the policy that we employ will not be picked to pieces through Congressional debates or nitpicking Congressional action."
- Such limits could increase the risk to U.S. forces in the field, who could be forced to withdraw under fire.
- Debates over the time deadline provide an undesirable occasion for interbranch or partisan rivalry, potentially misleading our adversaries into assuming an absence of national resolve, thus escalating the military and political risks.
- The automatic nature of the deadline, if obeyed, would result in the termination of Executive protection of the national interest without any Congressional action taking full responsibility for that termination.
- The deadline also reduces the effectiveness of potential role of Congress by placing unnecessary pressure on Congress to act where the President has not sought specific legislative approval to continue an action beyond the designated time limits.

- The nation has successfully defended its interests by following a pattern of government in which Congress withholds final judgment on Executive actions until their outcome becomes more clear. Once again, as Senator Tower said: "Congress is not structured to maintain the day-to-day business of the conduct of diplomacy. Congress is not structured to devise and maintain a long-term, comprehensive, reliable foreign policy."

The concurrent-resolution aspect of Section 5 is clearly unconstitutional under Chadha v. INS. In that case, the Supreme Court held that Congress may not regulate matters beyond its own internal affairs other than through legislation, subject to the veto. To the extent Congress can impose restrictions relating to military action, it can only do so by legislation subject to a Presidential veto. Because the War Powers Resolution's concurrent resolution procedure violates this principle, it is unconstitutional and should be repealed. Moreover, Section 5(c) contemplates Congressional action that may intrude on the President's authority as Commander-in-Chief and Chief Executive Officer.

Sections 5(b) and (c) should be stricken, as proposed by the Byrd-Nunn-Warner bill. This course would be consistent with the Constitution and with U.S. national interests.

Section 6

Section 6 of the Resolution contains procedures for the expedited consideration of joint resolutions introduced pursuant to Section 5(b). Since we favor repeal of Section 5(b), we likewise favor repeal of this provision.

The Byrd-Nunn-Warner bill contains a somewhat different set of expedited procedures from those set forth in the War Powers Resolution and are designed to serve somewhat different purposes. Under that bill, expedited procedures would apply in either of two situations to any joint resolution approved by a majority of the permanent consultative group authorizing the President to continue a particular deployment of U.S. forces or prohibits him from doing so. The two situations are where the President has reported to Congress under Section 4(a)(1), or where a majority of the 18-member permanent consultative group finds that he should have done so.

The Byrd-Nunn-Warner bill would add two other provisions that would create undesirable consequences as a result of the adoption of a joint resolution opposing or disapproving Executive action. One provision would automatically prohibit the use of funds for any activity which would have the purpose or effect of violating any provision of such a joint resolution; the other would give standing in U.S. District Court to any Member of Congress to seek declaratory and injunctive relief on the ground that any provision of such a joint resolution had been violated. We oppose both of these proposals for both constitutional and policy reasons.

Congress has broad power to control the expenditure of funds. Congress, however, may not use its funding power to restrict or usurp the independent constitutional authority of another branch. For example, Congress could not require the Supreme Court to decide a case in a particular way as a condition on the use of funds by the judiciary. By the same token, Congress could not lawfully deny funds for the armed forces to compel the President to cease exercising functions that are lawfully his as Commander-in-Chief, such as the defense of U.S. vessels from attack on the high seas in a particular region. Congress would also exceed its authority by ordering the President to conduct a particular type of military operation in a specific manner; the power to control spending cannot properly be used to interfere with the President's discretion over the conduct of military operations.

We believe the proposal to permit suit by any Member of Congress would be inconsistent with current case law, and a grave setback for the system of separation of powers established by the Framers. The federal courts have prudently decided that they will not exercise jurisdiction over suits based on the War Powers Resolution. The courts have held that such suits raise non-justiciable political questions which should be resolved by the political branches. Congress has no institutional interest in having the courts pass on such questions. As the courts have concluded, judicial supervision is inherently unsuited to monitoring military actions outside the United States, or resolving political controversy over the propriety of such actions. Congress, as we have seen, has ample power concerning the President's use of military forces. It should not resort to the courts to perform its proper function.

Particularly troublesome is the concept that any single Member of Congress would have the right to sue. This provision is objectionable both from a legal and a policy perspective. As a legal matter, we believe the Congressional standing provision purports unconstitutionally to expand the jurisdiction of the federal courts to litigation not presenting an Article III case or controversy. We believe that membership in Congress, without more, is insufficient to confer standing under Article III. The amendment purports to grant standing to members of Congress merely for the purpose of enforcing a generalized grievance about governmental conduct; but this is insufficient to confer standing on a member of Congress, just as it is for a member of the general public.

This provision fares no better when viewed from a policy perspective. For example, under the Byrd-Nunn-Warner proposal, Congress might enact a joint resolution authorizing continuation of the President's use of the Armed Forces, subject to certain conditions, and the Congress as a whole might be perfectly satisfied with the President's compliance with the resolution; and yet, one or more dissatisfied Members of Congress would be authorized to bring the matter into the courts with the objective of obstructing or disrupting the President in his direction of U.S. Armed Forces in a situation of actual or potential hostilities.

The Constitution intended that such situations be resolved by the Congress and the Executive branch in the exercise of their respective constitutional powers, ideally in a spirit of cooperation and concern for the national interest. Whether or not Congress as a whole would act in a partisan manner in such situations, the risks of partisan motivation are great indeed when a single Member is authorized to sue.

Section 8(a)

Section 8(a) of the Resolution purports to instruct future Congresses on the manner in which they may choose to authorize the introduction of U.S. Armed Forces into actual or imminent hostilities. Specifically, it states that no law passed - or treaty ratified - can ever authorize such action unless it contains an explicit statutory statement that it is intended to constitute specific authorization within the meaning of the Resolution.

This provision appears to be a response to the fact that the Tonkin Gulf Resolution, contemporaneous appropriation legislation, and the SEATO Treaty were construed by courts in the 1970's to authorize conduct of the Vietnam war. In our view, Section 8(a) ineffectively attempts to restrict the rights of future Congresses to authorize deployments in any way they choose.

If a Congress chooses to adopt a statutory provision which authorizes the President to act, but fails to mention the Resolution, that authorization is nonetheless valid and effective, whatever the Congress may have said to the contrary in 1973. Indeed, the passage of such a law would properly be regarded as the equivalent of an amendment of the War Powers Resolution, since subsequent statutes are controlling over earlier ones that contain inconsistent provisions. In short, if Congress supports an Executive initiative to the extent Congress supported the President in Vietnam, the initiative would, we believe, be upheld in court as lawful. We therefore favor repeal of Section 8(a), to remove any misunderstanding as to its constitutional effect.

Conclusion. This review of the key provisions of the War Powers Resolution makes clear that the Administration has constitutional and policy objections to various provisions of the Resolution in its current form. We believe it should be repealed altogether. We particularly urge repeal of Sections 2(b), 5(b), 5(c) and 8(a). The Byrd-Nunn-Warner bill would properly delete three of these sections, but contains other provisions which the Administration could not accept.

In the last analysis, we cannot solve the problems which the Resolution seeks to remedy merely by adopting new, more detailed statutes or restating general principles. The only effective solution for these problems is for the two political branches to work together in pursuit of common national interests, to communicate more effectively with one another on their particular concerns and ideas, and to utilize their proper powers to influence events rather than attempting to modify a constitutional framework that has served us too well to jeopardize.